STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. William B. Murphy, Richard Allen Griffin and Helene N. White presiding

CITY OF TAYLOR,	**Supreme Court Case No. 127580**
Plaintiff-Appellee,	**Court of Appeals Case No. 250648**
v	**Wayne County Circuit Court No. 02 221723-CZ**
THE DETROIT EDISON COMPANY,	
Defendant-Appellant.	

James A. Ault (P30201)
Michigan Electric & Gas Association
110 W. Michigan Avenue, Suite 1000B
Lansing, Michigan 48933
(517) 484-7730

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
Attorneys for Amicus Curiae Michigan Electric Cooperative Association
DYKEMA GOSSETT PLLC
Lansing, MI 48933
(517) 374-9184

Jon R. Robinson (P27953)
Vincent P. Provenzano (P28673)
Attorneys for Amicus Curiae Consumers Energy Company
One Energy Plaza
Jackson, MI 49201
(517) 788-2151

BRIEF OF MICHIGAN ELECTRIC INDUSTRY AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT THE DETROIT EDISON COMPANY

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. In ratifying Const 1963, art 7, § 29, the people of Michigan granted municipalities only "reasonable control" of their highways, streets, alleys and public places. "Reasonable control" is commonly understood to mean that which is rational, moderate, well balanced, within the bounds of reason, grounded in sound judgment, and not excessive, too expensive, ridiculous or absurd.

Should the decisions of the Wayne County Circuit Court and Court of Appeals be reversed because they erroneously failed to determine that a municipality exceeds the commonly understood meaning of "reasonable control" when it passes an ordinance requiring electric utilities to dismantle fully functional overhead electric lines and relocate those lines underground even though the relocation is done primarily for aesthetic reasons, conflicts with policies established by the Michigan Public Service Commission, and costs millions of dollars that necessarily will be paid by many customers who will never benefit from the purely local aesthetic improvements?

Defendant-Appellant The Detroit Edison Company says "YES."

Amicus Curiae Michigan Electric Industry says "YES."

Plaintiff-Appellee City of Taylor says "NO."

The Court of Appeals and Wayne County Circuit Court say "NO."

II. Prior decisions of this Court have held that municipalities do not have "exclusive control" over their public highways, streets, alleys and publics places but are limited under Const 1963, art 7, § 29 to "reasonable control." Those decisions also hold that "reasonable control" permits a municipality to regulate matters of mere local concern, but it does not authorize a municipality to extend its control into areas that extend beyond its local jurisdictional limits, including matters already addressed by State law, regulated by the State or of statewide interest.

Should the decisions of the Wayne County Circuit Court and Court of Appeals be reversed because they erroneously failed to determine that a municipality exceeds the boundaries of "reasonable control" as determined by prior decisions of this Court when it passes an ordinance requiring electric utilities to dismantle fully functional overhead electric lines and relocate those lines underground even though the relocation conflicts with rules and policies established by the Michigan Public Service Commission that have a statewide application, and costs millions of dollars that necessarily will be paid by many customers who will never benefit from the purely local aesthetic improvements?

Defendant-Appellant The Detroit Edison Company says "YES."

Amicus Curiae Michigan Electric Industry says "YES."

Plaintiff-Appellee City of Taylor says "NO."

The Court of Appeals and Wayne County Circuit Court say "NO."

III. The Legislature delegated to the Michigan Public Service Commission the responsibility for overseeing utility ratemaking. The Michigan Public Service Commission has established procedures for utilities seeking rate increases, all of which require contested case proceedings and substantive review by the agency and none of which can immediately address multi-million dollar costs incurred as a result of a municipal ordinance.

Should the decisions of the Wayne County Circuit Court and Court of Appeals be reversed because they erroneously failed to determine that a municipality exceeds the boundaries of "reasonable control" when it passes an ordinance that imposes millions of dollars in costs upon utilities and their customers without any meaningful review by the Michigan Public Service Commission, and even though there is no effective regulatory mechanism for addressing such astronomical and local costs?

Defendant-Appellant The Detroit Edison Company says "YES."

Amicus Curiae Michigan Electric Industry says "YES."

Plaintiff-Appellee City of Taylor says "NO."

STATEMENT OF JURISDICTION AND AUTHORITY FOR FILING AMICUS BRIEF

Amicus Curiae Consumers Energy Company ("Consumers Energy"), the Michigan Electric and Gas Association ("MEGA"), and the Michigan Electric Cooperative Association ("MECA") (collectively, "the Electric Industry")[1] accept and incorporate Defendant-Appellant The Detroit Edison Company's ("Detroit Edison") Jurisdictional Statement. The Electric Industry further states that this Court has jurisdiction and authority to consider this Brief pursuant to MCR 7.306(D) and the Court's Order entered October 6, 2005.

[1] The Michigan Municipal Electric Association filed a joint brief with the Electric Industry in support of Detroit Edison Company's leave to appeal. The Michigan Municipal Electric Association is not a signatory to this amicus brief.

STATEMENT OF INTEREST

By ratifying the third clause of Const 1963, art 7, § 29, the people of Michigan determined that municipalities should not have exclusive and unlimited power over their highways, streets, alleys and public places. Instead, the people declared in their Constitution that municipalities are granted only "reasonable control."

The decisions of the Wayne County Circuit Court and Court of Appeals ("the Rulings") concern the Electric Industry because they eradicate the constitutional limitation of "reasonable control." The Rulings allow municipalities to pass ordinances mandating that utilities abandon functional facilities and reconstruct major portions of their electric distribution systems while simultaneously assigning the massive cost of such endeavors to the utilities and, ultimately, customers who never will experience the local benefit. The Rulings also will permit municipalities to seize legislatively-delegated authority over utilities from the Michigan Public Service Commission ("MPSC") by passing ordinances that conflict or interfere with statewide regulatory policies and that require rate recovery in the millions of dollars without any regulatory review.

The decisions rendered in this case will have far-reaching effects on how the electric business operates in Michigan. The Electric Industry respectfully requests that the Court issue an opinion and judgment reversing the Rulings and declaring the challenged City of Taylor ordinance unconstitutional because it exceeds the meaning of "reasonable control" under the plain language of Const 1963, art 7, § 29 and under several longstanding decisions of this Court that limit "reasonable control" to local concerns and not matters of statewide interest or matters that already are subject to comprehensive statewide regulation and oversight. Alternatively, the Electric Industry respectfully requests that the Court reverse the Rulings and order the case transferred

to the MPSC under the primary jurisdiction doctrine. The MPSC possesses the necessary expertise to properly consider underground electric line policies as set forth in existing administrative rules and utility tariffs. It also has the necessary expertise to consider related issues of public safety as affected by the City of Taylor's proposed underground relocation project, the nature and reasonableness of underground relocation costs, how such costs and unrecovered costs of the removed overhead system should be allocated and recovered in utility rates and whether changes in existing regulatory policy are needed.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS AND INTRODUCTION TO THE ELECTRIC INDUSTRY MEMBERS

A. Material Facts And Proceedings.

The Electric Industry adopts Detroit Edison's Statement of Facts. The Electric Industry also emphasizes that the ordinance at issue in this case was passed during the course of a dispute between the City of Taylor and Detroit Edison over the party responsible for bearing the cost of undergrounding approximately four (4) miles of electric facilities. The City of Taylor passed the ordinance even though it knew the MPSC has adopted an electric system underground location policy and utility tariff provisions address the undergrounding of electric facilities. The City of Taylor passed the ordinance to resolve the active dispute over cost responsibility and did not attempt to bring its concerns before the MPSC.

B. The Electric Industry Members.

Consumers is an electric and gas public utility that provides electric service to more than 1.7 million customers located in most counties of Michigan's Lower Peninsula. As an essential part of its electric service, Consumers owns and operates an interconnected electric distribution network, including poles and conduit, wires, transformers, substations and other facilities. Consumer's system, constructed over many years at great expense, includes 347 miles of high voltage distribution overhead radial lines operating at 120 kilovolts (kV) and above; 4,513 miles of high voltage distribution overhead lines operating at 23 kV or 46 kV; and 62,882 miles of other electric distribution overhead lines. (Consumers Affidavit, attached hereto as **Attachment 1**.)

MEGA is a Michigan nonprofit corporation serving as a trade association for its member electric and gas public utilities providing service in Michigan. MEGA's electric utility members include Alpena Power Company, Edison Sault Electric Company, Indiana Michigan Power Company, Upper Peninsula Power Company, WE Energies, Wisconsin Public Service Corporation and Xcel Energy. Collectively, MEGA's members serve approximately 260,000 customers through the operation of interconnected distribution systems, including overhead and underground lines and related distribution equipment. MEGA members provide approximately 9% of the electricity sold in Michigan by MPSC-regulated utilities and provide electric service in defined service territories located throughout all of Michigan, including Michigan's Upper Peninsula. (MEGA Affidavit, attached hereto as **Attachment 1**.)

MECA is a Michigan nonprofit corporation serving as the statewide association for Michigan's nine (9) rural electric distribution cooperatives and one generation and transmission cooperative, including Alger Delta Cooperative Electric Association, Cherryland Electric Cooperative, Cloverland Electric Cooperative, Great Lakes Energy Cooperative, HomeWorks Tri-County Electric Cooperative, Midwest Energy Cooperative, The Ontonagon County Rural Electrification Association, Presque Isle Electric & Gas Co-Op, Thumb Electric Cooperative and Wolverine Power Cooperative. With the exception of Wolverine, a wholesale power supply cooperative, the cooperatives operate local distribution systems that provide electric service to more than 600,000 citizens in rural areas covering all or part of 58 counties in Michigan's Lower and Upper Peninsulas. The cooperatives' distribution systems include approximately 35,750 miles of overhead lines. Wolverine's transmission system

includes approximately 1,600 miles of lines. (MECA Affidavit, attached hereto as **Attachment 1**.)

Consumers Energy and the utility members of MEGA and MECA are subject to reasonable local control requirements including requirements of franchises, municipal ordinances and right-of-way permits. Their statewide rates and services also are subject to comprehensive regulation by the MPSC.

SUMMARY OF ARGUMENT

The Rulings must be reversed because they are contrary to the Michigan Constitution. Although municipalities have franchise and consent rights when dealing with public utilities, the people of Michigan have declared in Const 1963, art 7, § 29 that municipalities retain only "reasonable control" over their highways, streets, alleys and public places.

The term "reasonable" is commonly understood as that which is rational, moderate, well balanced, within the bounds of reason, grounded in sound judgment, and not excessive, too expensive, ridiculous or absurd. Consistent with the commonly understood meaning of "reasonable," this Court also has held for almost 100 years that municipal control is "reasonable" when it addresses issues of local concern but it is "unreasonable" when it impinges on the State's authority or extends beyond mere local concerns to affect statewide interests.

The City of Taylor ordinance at issue in this case is unreasonable under that term's commonly understood definition and prior decisions of this Court. Mindful of the statewide importance of electricity and the need for a comprehensive and uniform electric system, the Legislature delegated to the MPSC the responsibility for overseeing electric utilities. This includes a responsibility for the safety, engineering, and design aspects of electric facilities, as well as the rates that electric utilities may charge their customers. The Legislature has not made an equivalent delegation of power to the municipalities. The City of Taylor ordinance invades the MPSC's jurisdiction over electric utilities and conflicts with established policies regarding the construction, relocation and undergrounding of electric facilities. It also requires utilities to underground fully functional electric systems even though the cost of doing so is

astronomical and even though many of the customers who ultimately will incur the relocation costs will never experience the local beautification and health and safety benefits. The City of Taylor ordinance fails to qualify as "reasonable control" for the additional reason that it imposes millions of dollars in costs upon utilities and customers without regulatory review and without providing the utilities and customers any meaningful opportunity to avoid such costs.

Finally, if the Court does not find the City of Taylor ordinance unconstitutional because it is unreasonable, the Court should reverse the Rulings and apply the primary jurisdiction doctrine so the MPSC has the opportunity to evaluate the ordinance and claimed relocation costs in light of its regulatory policies.

ARGUMENT

I. **CONST 1963, ART 7 § 29 GRANTS TO MUNICIPALITIES ONLY REASONABLE CONTROL. THE PEOPLE UNDERSTOOD REASONABLE CONTROL TO MEAN CONTROL THAT IS "RATIONAL," "NOT EXCESSIVE OR IMMODERATE," "NOT EXTREME," "NOT ABSURD," "NOT RIDICULOUS" AND "NOT DEMANDING TOO MUCH." PRIOR DECISIONS OF THIS COURT ARE CONSISTENT WITH THE COMMONLY UNDERSTOOD MEANING OF THE TERM REASONABLE CONTROL AND HOLD THAT REASONABLE CONTROL MEANS CONTROL THAT ADDRESSES MERE LOCAL CONCERNS AND DOES NOT INTERFERE WITH STATE AUTHORITY OR MATTERS OF STATEWIDE INTEREST.**

A. Standard Of Review.

The Electric Industry agrees with Detroit Edison that constitutional issues are reviewed de novo by this Court. Wayne Co v Hathcock, 471 Mich 445, 455; 684 NW2d 765 (2004).

B. The People Understood Reasonable Control To Mean Control That Is "Rational," Well Balanced," "Within The Bounds Of Reason," "Grounded In Sound Judgment," "Not Expensive," "Not Excessive," "Not Extreme," "Not Absurd," "Not Ridiculous" And "Not Demanding Too Much."

Const 1963, art 7, § 29 provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. **Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government**. [Emphasis added].

This case does not involve consent to the use of the City of Taylor's streets or issuance of a franchise for Detroit Edison's local business. Instead, this case focuses on the

interpretation of the constitutional provision's third sentence and what is meant by "reasonable control."

In Hathcock, supra, this Court stated that the standards applicable to constitutional interpretation are as follows:

> The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. [People v Nutt, 469 Mich. 565, 573, 677 N.W.2d 1 (2004).] This rule of "common understanding" has been described by Justice COOLEY in this way:
>
> > "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it.* 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' " [*Traverse City School Dist. v. Attorney General,* 384 Mich. 390, 405, 185 N.W.2d 9 (1971) (emphasis in original), quoting 1 Cooley, Constitutional Limitations (6th ed.), p. 81.]
>
> In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified. In order to reach the objective of discerning the intent of the people when ratifying a constitutional provision, we apply the plain meaning of each term used therein at the time of ratification unless technical, legal terms were employed. *Phillips v. Mirac, Inc.,* 470 Mich. 415, 422, 685 N.W.2d 174 (2004). Hathcock, supra at 468.

Applying the interpretation standards discussed in Hathcock, at the time the "reasonable" clause was first added to the Constitution in 1908, its plain and common meaning was:

> **1.** Having faculty of reason; rational. **2.** Governed by reason; thinking, speaking, or acting rationally, or according to the dictates of reason; agreeable to reason. **3.** Not excessive or immoderate; proper.

Webster's Collegiate Dictionary, 3rd ed (1905), p 677, attached hereto as **Attachment 2**.[2] This common meaning still was accepted when the Constitution was ratified in 1963:

> **1a.** agreeable to reason **b:** not extreme or excessive **c:** MODERATE, FAIR **d:** INEXPENSIVE **2a:** having the faculty of reason: RATIONAL **b:** possessing sound judgment.

Webster's Collegiate Dictionary, 7th ed (1963), p 713, attached hereto as **Attachment 3**.

See also Webster's Third New Dictionary, 3rd ed (1963), p 1892, attached hereto as **Attachment 4**, which defines "reasonable" as:

> **1a.** being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous . . . **b:** being or remaining within the bounds of reason: not extreme: not excessive . . . **c:** MODERATE as **(1):** not demanding too much . . . **(2):** not expensive . . . **(3):** that allows a fair profit **2a:** having the faculty of reason . . . **b:** possessing good sound judgment: **well balanced:** SENSIBLE.

Thus, at the time Const 1963, art 7, § 29 was ratified in 1908 and 1963, the people of Michigan would have understood the third clause of the constitutional provision to limit municipal power over highways, streets and alleys to actions that were rational, moderate, well balanced, within the bounds of reason, grounded in sound judgment, and not excessive, too expensive, ridiculous or absurd.[3]

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[2] The 1905 Collegiate Dictionary was the version closest to year 1908 that the Electric Industry was able to obtain from Merriam-Webster, Inc., the publisher of Webster's dictionary.

[3] This plain meaning is relatively unchanged in current times. The Second College Edition of the American Heritage Dictionary defines "reasonable" as "capable of reasoning," "rational," "governed by or in accordance with reason or sound thinking,"

II. LONGSTANDING DECISIONS OF THIS COURT ARE CONSISTENT WITH THE COMMONLY UNDERSTOOD MEANING OF THE TERM "REASONABLE." THEY HOLD THAT IT IS NOT REASONABLE FOR A MUNICIPALITY TO USE ITS CONSTITUTIONAL POWER FOR REASONS THAT EXTEND BEYOND MERE LOCAL CONCERN AND FOR ACTIONS THAT IMPINGE ON THE STATE'S AUTHORITY OR AFFECT STATEWIDE INTERESTS.

In Lenawee County Gas & Electric Co v City of Adrian, 209 Mich 52, 57-58; 176 NW 590 (1920), this Court observed:

> Both 'reasonable' and 'rate,' while words of frequent use, are relative terms of such varied and shaded meaning, not only in the abstract, but often in the particular connections used, as to be difficult of exact definition and afford a broad field of controversy. It has been said that any attempt to give a specific meaning to the word 'reasonable' is like trying to count that which is not numbered, and its exact meaning, when applied to particular subjects, in qualification or action or conduct, has been a topic of abundant discussion in legal text-books and reported decisions.

Even though this observation suggests that the term "reasonable" may not be a term that lends itself to exactness or preciseness, prior decisions of this Court that interpret the term "reasonable" with regard to municipal control over public highways, streets, alleys and publics places have stated with clarity, exactness and preciseness that the term "reasonable" does not mean "exclusive" and that a municipality's "reasonable control" does not extend into areas occupied by the State or issues beyond mere local concern.

In 1908, the year the reasonable clause first appeared in the Michigan Constitution, this Court had to determine whether the City of Detroit was authorized to contract with a local gas company and prescribe the rate that the local gas company

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"within the bounds of common sense," "not excessive or extreme; fair." Second College Edition of American Heritage Dictionary, 2nd ed (1991), p 1031.

would charge City of Detroit residents. Boerth v Detroit City Gas Co, 152 Mich 654; 116 NW 628 (1908). Although no constitutional provision was involved, a critical issue was whether the City of Detroit could contractually set rates through its statutory authority to prescribe "reasonable regulations." In determining that it was not improper for the City to contract with the local company concerning rates, and in analyzing what was "reasonable," the Court found it significant that the Legislature had not acted to determine what rates municipal residents should be charged:

> The only language in the statute limiting the authority of the municipality is to be found in the language authorizing the municipality to prescribe reasonable regulations for the laying of the pipe. Without undertaking to definitely determine what is meant by reasonable regulations, it is quite clear that nothing but unreasonable regulations are prohibited. Authority to prescribe rates, then, is not prohibited, unless that authority may be properly denominated unreasonable. . . . Is it unreasonable for the city to prescribe the rates at which gas shall be furnished to its inhabitants? . . . As a practical proposition it may be said then that consumers must either pay the rates fixed by the company or the rates prescribed by municipal authority, in the absence, as in this case, of any action by the Legislature. It may be said, then, that in order to safeguard the rights of its inhabitants who use gas it is not only unreasonable that the city should have the power to fix rates, but it is highly expedient –indeed, it is necessary –that it should possess that power. *Id.* at 657-659.

In holding that it was not unlawful for the City of Detroit to contract for certain rates, the Court observed that the case did not involve whether the City of Detroit had legislative power to determine rates. Instead, "the power to prescribe rates by contract—and that is the power which was exercised in this case—is a very different power from the legislative power regulating rates." Id. at 659.

People v McGraw, 184 Mich 233; 150 NW 836 (1915), is another case that holds municipal action is "unreasonable" when it extends beyond mere local concerns and

municipal jurisdictional limits, and is inconsistent with State law or regulations. In the first case analyzing the constitutional meaning of "reasonable control," this Court stated in McGraw, supra that:

> In the study of section 28, it is interesting to notice what the committee on submission and address to the people said with reference thereto, in submitting the proposed revision to the people (page 1433, vol. 2, Proceedings and Debates of the Constitutional Convention):
>
> > 'This is a new section, and its purpose is to prevent the use of streets, alleys, highways, and public places without the consent of the local authorities first had and obtained. The word 'reasonable' was inserted to place a limitation upon the authority cities, villages and townships may exercise over the streets, alleys, highways, and public places within their corporate limits. And it was pointed out in the debates that without the word 'reasonable,' or a similar qualification, the section would practically deprive the state itself of authority over its highways and public places.'
>
> From this, and also from reading the debates with reference to the insertion of the word 'reasonable,' it is clear that it was not the intention of the framers of the Constitution to deprive absolutely the state itself of control over its highways and bridges in the cities, villages, and townships. The claim that the reservation should be limited to the control of public utility corporations, to our minds, overlooks entirely the express language of the last sentence of said section 28. By giving the language of the whole section its ordinary and natural meaning, public utilities were placed under control of the local authorities, and the local authorities may control within reason the use of their streets for any purposes whatsoever not inconsistent with the state law.
>
> Taking the sections together, they should be so construed as to give the power to municipalities to pass such ordinances and regulations with reference to their highways and bridges as are not inconsistent with the general state law. In other words, the municipality retains *reasonable control* of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have

> been established, or may be established, by the state itself with reference thereto.

Id. at 237-239 [Emphasis in original].

Numerous other decisions issued by this Court have recognized the priority of the State over municipalities when determining whether a municipality properly exercised "reasonable control." See City of Kalamazoo v Titus, 208 Mich 252, 266; 175 NW 480 (1919) ("The Constitution recognizes, as former Constitutions have recognized, the general control of the Legislature over cities."); North Star Line v City of Grand Rapids, 259 Mich 654, 662-663; 244 NW 192 (1932) ("Beyond question a municipality has the power to exercise reasonable control of the streets, alleys, and public places within its own limits. This is its constitutional right, and in the exercise thereof it may enact ordinances for the reasonable regulation of interurban motorbuses provided such regulation does not affect the business outside the municipality . . . [b]ut as applied to other than intracity motorbuses operating as common carriers, the reasonable control of the highways reserved by the Constitution to cities, villages, and townships is obviously that which is incidental to local traffic regulations and the proper exercise of the police power within the territorial limits of the municipality. If the attempted regulation operates outside the city limits, as well as inside such limits, it is beyond the scope of a valid ordinance regulation."); Detroit, Wyandotte & Trenton Transit Co v City of Detroit, 260 Mich 124; 244 NW 424 (1932) (Court holding that municipal ordinance, as applied to jitneys not doing local business, was unreasonable because it invaded state jurisdiction.); City of Niles v Michigan Gas & Electric Co, 273 Mich 255, 264; 262 NW 900 (1935) (explaining that any implied authority of municipalities under Const 1908, art 8 § 28 to "fix or contract for [utility] rates is inoperative when the Legislature exercises

its reserved governmental power over them."); Allen v Ziegler, 338 Mich 407, 415-416; 61 NW2d 625 (1953) ("The right to reasonable control of their streets is not a gift of an arbitrary prerogative to the cities, villages and townships. The reasonableness of the city's control of its streets is not to be within the final determination by the city in all cases, for that in practical effect could erase the word 'reasonable' from the constitutional provision. The reasonableness may be determined in accordance with the State legislature's interpretation in some instances provided that such interpretation can be approved by the court."); Dearborn v Michigan Turnpike Authority, 344 Mich 37, 53; 73 NW2d 544 (1955)(quoting and agreeing with Ziegler, supra).[4]

III. THE LEGISLATURE DELEGATED TO THE MPSC THE RESPONSIBILITY OF REGULATING ELECTRIC UTILITIES, INCLUDING THE CONSTRUCTION AND OPERATION OF ELECTRIC FACILITIES. PURSUANT TO THAT DELEGATED AUTHORITY, THE MPSC ADOPTED RULES AND APPROVED UTILITY TARIFFS CONCERNING THE UNDERGROUNDING OF ELECTRIC FACILITIES. THE CITY OF TAYLOR ORDINANCE EXCEEDS REASONABLE CONTROL UNDER THE COMMONLY UNDERSTOOD MEANING OF THAT TERM AND THIS COURT'S PRIOR DECISIONS BECAUSE THE ORDINANCE INVADES THE MPSC'S JURISDICTION AND IS INCONSISTENT WITH STATE POLICIES AS EXPRESSED THROUGH ADMINISTRATIVE RULES AND TARIFFS.

A. The Legislature Delegated Electric Matters To The MPSC And Not To The Municipalities.

The Legislature delegated to the MPSC the duty and responsibility of regulating electric utilities primarily through 1939 PA 3, MCL 460.1 et seq. and 1909 PA 106, MCL

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[4] Other constitutional provisions recognize the importance of limiting municipal powers to local matters. Const 1963, art 7 § 22, the provision governing municipal power and authority to adopt and amend a charter, specifically refers to adopting "resolutions and ordinances relating to its municipal concerns, property and government." Const 1963, art 7 § 22 [Emphasis added.] Const 1963, art 4 § 51 declares that "the public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."

460.551 et seq. The extent of authority under those Acts granted by the Legislature was recently described as:

> The township board of any organized township is given very broad and general authority to adopt zoning ordinances by the Township Rural Zoning Act, MCL 125.271 et seq.; MSA 5.2963(1) et seq. That statute must be reconciled with the statutes granting power and jurisdiction to the MPSC over electric transmission lines.
>
> First, MCL 460.6; MSA 22.13(6) vests the MPSC with complete power and jurisdiction to regulate public utilities in the state, including power and jurisdiction to regulate matters pertaining to the operation of public utilities. That portion of the act has been determined by the Supreme Court to be merely an outline of the commission's jurisdiction and not a grant of specific powers to the commission.
>
> However, the transmission of electricity through highways act, MCL 460.551 et seq.; MSA 22.151 et seq. does grant specific powers to the commission to regulate the transmission of electricity. Section 4 of the act permits the commission to require the filing of detailed specifications covering the types of construction of electric transmission lines. Utilities may then construct the lines according to the commission's specifications. Section 5 of the act allows the commission to inspect and examine all electrical apparatus already installed and gives the commission power to order improvements in methods employed to transmit electricity. The act consistently limits the commission's power to regulate by referring to the transmission of electricity in, on, or through "the public highways, streets and places". The commission has been given the authority to regulate transmission in such places even though a township retains the right reasonably to refuse consent to the initial construction or erection of power lines. See Const 1963, art 7 § 29; MCL 247.183; MSA 9.263, MCL 247.185; MSA 9.265, MCL 460.553; MSA 22.153. This express legislative grant of power to the commission to control the transmission of electricity in, on, or through the public highways, streets and places precludes a township from passing ordinances regarding the same subject matter. Moreover, the limitation on the commission's power to regulate the transmission of electricity to that which occurs in, on, or through public highways, streets and places indicates a legislative intent that there should be no regulation of the lines on private

> property. If the MPSC, a specialized agency which could exert uniform control over extensive systems of transmission lines, is not allowed to regulate the safety of transmission lines on private property, we cannot believe that the Legislature would have intended for individual townships to be allowed to do so. We conclude that the provisions of the Township Rural Zoning Act do not empower a township to make safety regulations regarding electric transmission lines.

Detroit Edison v City of Richmond, 151 Mich App 40; 388 NW2nd 296 (1986). There is no equivalent or similar legislative delegation of powers over electric utilities to municipalities.

B. In Exercise Of The Powers Granted To It By The Legislature, The MPSC Adopted Rules And Regulations Concerning Underground Electric Systems.

Pursuant to its statutory authority under MCL 460.6, 460.55 and MCL 460.557, the MPSC adopted MPSC Rules 460.511 through 460.519, which comprehensively govern underground electric lines. See August 10, 1970 Opinion and Order in MPSC Case No. U-3001, In re Rules Governing Underground Electric Extensions, Detroit Edison Appx. 18a-27a.) The MPSC's Rules address both the initial construction of underground lines (MPSC Rules 460.511, 460.512, 460.513, 460.514, 460.515 and 460.517), and the replacement of existing overhead lines with underground facilities (MPSC Rule 460.516).

In adopting those Rules, the MPSC considered a number of issues, including the costs of underground conversion. It found that: (i) the burial of electric facilities increases the utility's rate base and the cost of rendering service to its customers; (ii) overhead electric construction is the most standard method of serving electric customers at the present time and it would not be reasonable to charge higher rates to the vast majority of customers served from overhead systems in order to provide

underground electric facilities for relatively few customers; and (iii) those who benefit directly from the burial of electric facilities should pay the difference between the cost of standard overhead and underground facilities. The MPSC also recognized the statewide issues involved, including the rate impacts on utility customers. It thus carefully balanced the "wide public interest in, and public support for, a compulsory policy of undergrounding electric utility facilities," the "technology and the economies involved," and the "cost of rendering service," and concluded that "it would not be reasonable to charge higher rates to the vast majority of customers served from overhead systems in order to provide underground electric facilities for the relatively few customers." August 10, 1970 Opinion and Order in MPSC Case No. U-3001, In re Rules Governing Underground Electric Extensions, Detroit Edison Appx. 19a-20a.

The City of Taylor's desire to "underground" Edison's overhead lines already was considered by the MPSC and the MPSC found that cost causers should be cost payers, explaining: "Those who benefit directly from the burial of electric facilities should make a contribution in aid of construction to the utility in an amount equal to the estimated difference in cost between the standard overhead facilities and the generally more aesthetic underground facilities" August 10, 1970 Opinion and Order in MPSC Case No. U-3001, In re Rules Governing Underground Electric Extensions, Detroit Edison Appx. 19a-20a. The City of Taylor ordinance is unreasonable because it interferes with an area already subject to pervasive regulation by the MPSC, the agency charged by the Legislature with responsibility over electric utilities.

C. In Exercise Of The Powers Granted To It By The Legislature, The MPSC Approved Utility Tariffs Concerning Underground Electric Systems.

The City of Taylor ordinance is unreasonable because it conflicts with existing MPSC-approved utility tariffs.[5] The Electric Industry utilities do not pay relocation costs where municipalities seek underground relocation of functional systems for aesthetic reasons. They do have tariffs that implement the existing MPSC policy for underground electric distribution systems.

Many Michigan electric utilities, for example, have a policy similar to the following expression in Consumers Energy Tariff, Section B15.2 (Sheet B-57.00) and WE Energies Tariff MPSC No. 2, Sheet 40[6]:

> The general policy of the Company is that real estate developers, property owners or other applicants for underground service shall make a contribution in aid of construction to the Company in an amount equal to the estimated difference in cost between underground and equivalent overhead facilities.

Typically, the cost of existing overhead systems is recovered over the lifetime of the assets through depreciation expense and return in the utility rate structure, as determined by the MPSC. Mandatory underground relocation projects force premature retirement and unnecessary replacement of the overhead system, as in this case, thereby creating a serious issue regarding the appropriate rate treatment of the un-recovered capital costs of the removed system. This provision in Alpena Power's Tariff

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[5] As explained in Michigan Basic Property Ins Assoc v Detroit Edison Co, 240 Mich App 524, 531; 618 NW2d 32 (2000), a tariff is part of the contract between the utility and its customers.

[6] All tariff provisions cited in this brief are available electronically through links on the MPSC public website (www.michigan.gov/mpsc - electricity - rate books - company name). They are not attached because of their voluminous nature.

MPSC No. 8, Section VII, C, 1, I addresses both the new and un-recovered existing cost issues:

> Before construction is started the customer(s) shall be required to pay the Company the depreciated cost (net cost) of the existing overhead facilities plus cost of removal less the value of materials salvaged and also make a non-refundable contribution in aid of construction toward installation of the underground facilities in an amount equal to the estimated difference in cost between the new underground facilities and equivalent new overhead facilities . . .

The MPSC rules for underground electric lines and the MPSC-approved tariff provisions of utilities implementing those rules specify when underground location is necessary and when it is not. For example, certain tariff provisions provide for exception to the mandatory underground location requirements[7] if, in the company's judgment, conditions such as the following exist: (i) the facility will serve loads of only temporary duration, (ii) there will be little aesthetic improvement from undergrounding in the area or (iii) it is impractical to design and place facilities underground due to uncertain customer load characteristics. Consumers Energy Tariff, Sheet B 58.00.

Utility tariffs sometimes address directly the municipalities' rights in construction relocation situations, not necessarily limited to undergrounding. Edison Sault Electric Company has a provision stating that relocation work will be conducted at the utility's expense, with certain exceptions including situations where the original facilities were constructed in the right-of-way at the municipality's request, where there is a new public right-of-way or where the facilities involve public services such as streetlighting. Edison Sault Tariff MPSC No. 8, Section III (Sheet 7.30). This section also states:

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[7] The MPSC policy adopted in 1970 included a mandate for undergrounding residential subdivision new facilities, in the Lower Peninsula, with cost contribution by the developer. MPSC R 460.512.

> When the Company is requested to relocate its facilities for reasons other than road improvements, any expense involved will be paid for by the firm, person, or persons requesting the relocation . . .

Alpena Power has a similar provision that calls for advance agreement by the political subdivision to reimburse the Company for relocation expenses in situations where the utility will not bear the relocation costs due to the exceptions.

WE Energies and Great Lakes Energy Cooperative have tariff provisions indicating that certain issues regarding local ordinances and undergrounding would be addressed to the MPSC:

> The Company [or Cooperative] reserves the right, where local ordinance requirements are more stringent than these rules, to apply to the Michigan Public Service Commission for such relief as may be necessary.
>
> WE Energies Tariff MPSC No. 2 (Sheet 52), Great Lakes Cooperative Tariff MPSC No. 1 (Sheet 5.22).

This type of provision reflects the "safety valve" provision of Rule 8 (R 460.518) of the underground rules by which either Detroit Edison or the City of Taylor could have brought their dispute over cost allocation to the MPSC for review.

While electric utilities abide by the Michigan legal precedent regarding relocations required by local construction and improvement projects, this has not been extended to give municipalities complete discretion to determine the need for underground relocation and assign the resulting costs to the utility. The necessity of underground relocations of functional systems, the initial and ongoing costs of such systems, the cost-benefit tradeoff, the proper cost recovery, the un-recovered capital costs associated with the prematurely retired overhead system and the possibility of up-front contributions from the affected local area are all matters worthy of careful evaluation. Such items are within the scope of the MPSC's comprehensive electric

regulatory jurisdiction and expertise under the laws and regulations described in Detroit Edison's Brief On Appeal. Deciding the matter piecemeal, through multiple court decisions and adversarial litigation, is not the proper way to develop or alter reasonable statewide policies, especially when such major potential costs affecting a broad base of utility customers are at issue. Accordingly, the City of Taylor ordinance is unreasonable because it interferes with an area already subject to pervasive regulation by the MPSC through utility tariffs.

IV. THE CITY OF TAYLOR ORDINANCE EXCEEDS REASONABLE CONTROL UNDER THE COMMONLY UNDERSTOOD MEANING OF THE TERM AND THIS COURT'S PRIOR DECISIONS BECAUSE THE ORDINANCE REQUIRES UTILITIES TO UNDERGROUND FUNCTIONAL ELECTRIC SYSTEMS EVEN THOUGH THE COST OF DOING SO IS ASTRONOMICAL. THE CITY OF TAYLOR ORDINANCE ALSO EXCEEDS REASONABLE CONTROL BECAUSE IT INVADES THE MPSC'S RATEMAKING JURISDICTION, AFFECTS STATEWIDE INTERESTS AND REQUIRES NON-CITY OF TAYLOR CUSTOMERS TO BEAR THE BURDEN OF INCREASED COSTS EVEN THOUGH THOSE CUSTOMERS WILL NOT BENEFIT FROM THE LOCAL UNDERGROUNDING.

A. The City Of Taylor Ordinance Is Unreasonable Because The Costs Associated With Underground Relocation Of Electric Facilities Are Astronomical, Particularly Where The Current Electric Systems Are Fully Functional.

Relocating existing overhead utility systems underground is a costly endeavor. Here, Detroit Edison claims approximately $14.5 million in costs to relocate a mere four (4) miles of electric facilities along Telegraph Road, including over $7 million for relocating the facilities, $5 million to rebuild conduit and $2.5 million to reimburse the City of Taylor for conduit costs. This is over $3.5 million per mile.

The MPSC considered the costs of underground conversion in Case No. U-3001, when it adopted the underground relocation rules. Although it did not quantify the total cost of undergrounding Michigan's overhead electric facilities, the MPSC did conclude

that the burial of electric facilities increases the utility's rate base and the cost of rendering service to its customers. It also found that overhead electric construction is the most standard method of serving electric customers at the present time and it would not be reasonable to charge higher rates to the vast majority of customers served from overhead systems in order to provide underground electric facilities for relatively few customers. August 10, 1970 Opinion and Order in MPSC Case No. U-3001, In re Rules Governing Underground Electric Extensions, Detroit Edison Appx. 19a-20a.

Ice storms in recent years led to comprehensive state and industry studies of underground relocation of utility systems. The North Carolina Utilities Commission Public Staff recently estimated it would take three investor-owned utilities 25 years to underground all existing overhead distribution systems at a cost of about $41 billion. This would increase the book value of utility distribution assets about six times, requiring a 125% increase in monthly customer bills. See "The Feasibility of Placing Electric Distribution Systems Underground," Public Staff Report of November, 2003, available at www.ncuc.commerce.state.nc.us/reports, and attached hereto as **Attachment 5**.

The Edison Electric Institute ("EEI") developed a report concerning underground relocation costs and benefits. The cost of relocating overhead electric lines underground is up to ten (10) times the cost of constructing new overhead lines and system reliability benefits are uncertain. See Brad Johnson, "Out of Sight, Out of Mind?", EEI report issued January, 2004, available on the EEI website at www.eei.org/industry_issues/energy_infrastructure/distribution/UndergroundReport.pdf, attached hereto as **Attachment 6**. See also Wisconsin Public Service Corp v Town of Sevastopol, 105 PUR 4th 45, 46 (Wisconsin PSC 1989) (declaring an ordinance

mandating underground of all new transmission lines void because it would interfere with statewide system planning and increase costs by a factor of 10 to 20.)

The Maryland Public Utilities Commission declined to mandate increased use of underground electric lines due to cost and reliability issues. The Commission's order cited underground relocation cost estimates of $900,000 per mile and total system costs of $12 billion and $10.5 billion, respectively, for two state utilities. Preparedness of Maryland Utilities for Responding to Major Outages, 212 PUR4th 321 (2001). See also "Buried Power Lines Sparking Debate," Louisville Courier-Journal, July 25, 2004 (citing the EEI study and a local utility estimate as support for an undergrounding cost projection of $1 million per mile, or 10 times the cost of overhead lines, attached hereto as **Attachment 7**.)

In January, 2005, the Virginia Corporation Commission released a study concluding that relocating electric distribution lines underground would be prohibitively expensive whether recovered through service rates or taxation. The Virginia Corporation Commission estimated the statewide total cost to be approximately $83.3 billion, or $800,000 per mile of overhead relocation and $27,000 average cost per customer. See http://www.scc.virginia.gov/caseinfo/reports.htm for a full copy of the study, portions attached hereto as **Attachment 8**.

The existence and nature of these relevant studies demonstrate why underground relocation is a matter of statewide, not local, concern. The cost estimates illustrate how significant the financial stakes are for the entire electric industry and the public. At relocation costs of approximately $1 million per mile, even small relocation projects will have prohibitive cost impacts. Such costs imposed on a random and

sporadic basis through local ordinances would be particularly devastating on the smaller investor owned utilities and cooperatives, and their customers. Alpena Power Company, for example, has 17,390 customers and total annual revenues of about $21.3 million; Edison Sault Electric Company has 22,305 customers and annual revenues of nearly $36 million; some electric cooperatives have under 10,000 customers and annual revenues below $20 million. See affidavits attached hereto as **Attachment 1** and MPSC chart attached hereto as **Attachment 9.**

Unless reversed, the challenged Taylor ordinance and the lower court Rulings will provide precedent for countless other municipalities to adopt similar ordinances. These actions will seek to impose local aesthetic improvement costs on utilities and utility customers and waste valuable existing electric system assets by unnecessarily replacing them, without any evaluation or involvement of the agency responsible for electric matters. Similar ordinances would only result in more conflict, and possibly lead to enforcement litigation as utilities may be unable to finance the projects due to the rate recovery issues. The general public will not appreciate stealth taxation to fund local projects using the utility rate mechanisms. These are times of great concern over increased energy costs and particularly the impact on those struggling to pay bills as the state faces economic uncertainty.

The fact that the City of Taylor proceeded to adopt an ordinance imposing significant costs without consideration of the extraterritorial impacts and the viewpoint of the regulatory agency is a paradigm of unreasonable action.

B. The City Of Taylor Ordinance Is Unreasonable Because It Imposes Millions Of Dollars In Costs Upon Utilities And Their Customers Without Any Meaningful Ability To Avoid Such Costs, Without Any Review By The Agency Charged With Oversight Of Electric Rates And Even Though There Is No Regulatory Mechanism For Effectively Addressing Such Astronomical And Local Costs.

Ordinances like the one passed by the City of Taylor are unreasonable because they impose millions of dollars in costs upon the utilities and their customers without any meaningful ability to avoid such costs. The utilities must comply with the ordinance or risk lawsuits like that initiated by the City of Taylor against Detroit Edison. Although utilities could theoretically remove their lines rather than comply with such ordinances, this is not practical since electric distribution systems are interconnected and electric service is a necessity.

The City of Taylor ordinance imposes millions of dollars in costs upon the utilities without any review or approval by the MPSC--the agency charged with the responsibility of utility rates. Since "there is no free lunch," the ordinances essentially add a cost (capable of being millions of dollars) that must be recovered. Although indirect, a municipality in effect prescribes a rate increase by passing an ordinance like the City of Taylor ordinance.

Further, recovering a multi-million dollar cost increase is extremely difficult. Although the MPSC is not bound to a specific legal formula in setting regulated electric utility rates, it follows the approach commonly used in utility regulation across the country. In determining a just and reasonable rate, the MPSC determines the utility's cost of service. A "revenue requirement" is developed based on a detailed examination of the utility's cost of service, including such operating expenses as employee compensation, taxes, material and supply costs, maintenance, depreciation of assets

and a return (or profit). Typically a "test year" of actual utility expenses is used as a basis to develop reasonable expectations of these costs. The "return" consists of a reasonable percentage based on expected investor and lender returns applied to the "rate base," which consists of the un-depreciated value of the assets devoted to the utility service business, including costs of generating plants and the local distribution systems of wires, poles and transformers. The cost of service is allocated among the utility's entire customer base. Such allocations are typically based on class of customer (residential, commercial and industrial) rather than geographic regions or municipalities. Welch, Cases and Text on Public Utility Regulation (Revised edition), pp 247-258 (PUR Reports, Inc, 1968), Michigan Public Utilities Comm v Michigan State Tel Co, 228 Mich 658; 200 NW 749 (1924).

The MPSC rate adjustment procedures do not provide an expeditious method to address major underground relocation costs imposed by random municipal ordinances. The MPSC rate setting procedures are conducted as contested case evidentiary proceedings under the Administrative Procedures Act and notice and hearing are mandatory under MCL 460.6a. The statutory goal for completion of a utility general rate case is nine (9) months, although the cases can take much longer. MCL 460.6a(3). Not only is it expensive to prepare and conduct a general utility rate case, but the process does not facilitate rate adjustments to account for sudden increases in a single element of the utility's costs attributable to a municipal ordinance to relocate facilities underground. General rate cases require examination of all components of the cost of service. Single issue electric utility rate proceedings are generally limited to the

statutory procedures for annual adjustment for changes in the costs of fuel and purchased power under MCL 460.6j (power supply cost recovery).

The prospects of a utility recovering the costs imposed by a municipal relocation ordinance are mixed at best under the current system. There is no "rate tracking" mechanism to allow such costs to be passed on to customers in a timely manner. Nor is there a methodology for apportioning relocation costs only to those who benefit from such local relocation. Moreover, the random nature of such ordinances may render the associated costs "one time" or "nonrecurring" items which are difficult to account for in a test year. The "no free lunch" principle of basic economics still applies, however. The relocation costs may be transferred away by the municipality, but they will be paid. If rate recovery is unavailable then the revenue loss to the utility will have to be made up by reducing costs and return. This could mean deferral of scheduled replacements and upgrades of system components such as the distribution lines, poles, transformers and substations. It is readily apparent that imposing new costs on electric utilities through municipal underground relocation ordinances will disrupt the MPSC determination of the utility's reasonable revenue requirements, interfering with the statewide regulatory mechanism.

V. PROPER ANALYSIS OF THE CRITICAL ELEMENTS REQUIRES REFERRAL OF THE CASE TO THE MPSC UNDER THE PRIMARY JURISDICTION DOCTRINE.

The Court did not include the primary jurisdiction doctrine in the list of issues to be considered. If the Court does not reverse the Rulings and hold the City of Taylor ordinance unconstitutional, the Electric Industry supports Detroit Edison in its request

that the case be transferred to the MPSC under the primary jurisdiction doctrine[8] for consideration of the City of Taylor ordinance in light of statewide regulatory policy.

The MPSC has the specialized knowledge in the subject area of utility systems, service, rates and underground relocations. In Case No. U-3001, the MPSC already determined that a need exists for uniform statewide policy on underground relocations and their costs. Such uniformity was intended to be achieved and implemented in Case No. U-3001 through the administrative rules and subsequent tariffs. The development of a policy on underground relocations of functional utility systems for primarily aesthetic reasons should not be left to piecemeal actions of individual municipalities. The Court of Appeals' conclusion that the MPSC's pervasive regulatory scheme is not thrown out of balance by the ordinance is contradicted by the long-standing regulatory policy recognizing the significant costs of underground relocation and requiring contributions in advance of construction from the party requesting underground facilities. Allowing municipalities an unchecked power to impose new and unplanned project costs outside the MPSC process would threaten the stability of utility rates and the company finances. Further, the MPSC is entitled to regulate the character of construction of electric lines as well as safety matters and thus "occupies the field" in those areas.

In summary, if the Court does not reverse the Rulings and declare the City of Taylor ordinance unconstitutional, the Electric Industry urges the Court to apply its primary jurisdiction analysis and direct this case to the MPSC, where all of the relevant factors, including cost recovery, can be considered in a single forum. Such a decision would not prejudice municipalities because the MPSC will necessarily address their

[8] This Court recently reviewed the primary jurisdiction doctrine in Travelers Ins Co v Detroit Edison Co, 465 Mich 185; 631 NW2d 733 (2001).

concerns and the appropriate ratemaking measures in the regulatory forum, and the courts will remain available to review the regulatory action.

CONCLUSION AND RELIEF

The Electric Industry respectfully requests that the Court issue an opinion and judgment that reverses the decisions of the Wayne County Circuit Court and the Court of Appeals, and declares the challenged City of Taylor Ordinance unconstitutional because it exceeds the meaning of "reasonable control" under the plain language of Const 1963, art 7, § 29 and under several longstanding decisions of this Court that limit "reasonable control" to local concerns and not matters of statewide interest or matters that already are subject to comprehensive statewide regulation and oversight. Alternatively, the Electric Industry respectfully requests that the Court reverse the lower court decisions and order the case transferred to the MPSC under the primary jurisdiction doctrine.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Jon R. Robinson (with permission)

Jon R. Robinson (P27953)
Vincent P. Provenzano (P28673)
One Energy Plaza
Jackson, MI 49201
(517) 788-2151

MICHIGAN ELECTRIC COOPERATIVE ASSN

Christine Mason Soneral

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
DYKEMA GOSSETT PLLC
124 West Allegan, Ste. 800
Lansing, MI 48933
(517) 374-9184

MICHIGAN ELECTRIC & GAS ASSOCIATION

James A Ault (with permission)

James A. Ault (P30201)
110 W. Michigan Avenue, Suite 1000B
Lansing, MI 48933
(517) 484-7730
Dated: December 1, 2005

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ID\CMMA